UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re:	Chapter 7
DAVID NORKIN,	Case No. 97-50043 (AHWS)
Debtor.	

OBJECTION OF BRITESTARR HOMES, INC. TO MOTION TO TRANSFER VENUE

Britestarr Homes, Inc. ("Britestarr"), by and through its undersigned counsel, hereby objects the Motion to Transfer Venue (the "Motion") filed by Oak Point Property, Inc. ("Oak Point") on May 30, 2002, and respectfully represents as follows:

SUMMARY OF OBJECTION

The Motion should be denied because there is no basis in law or fact to undermine Britestarr's right to choose the appropriate forum for its bankruptcy case. Venue in the Southern District of New York is undeniably proper under section 1408(1) of the Bankruptcy Code. The facts support venue of the case in New York. The property is located in New York, its creditors are located in New York, the witnesses are located in New York, and litigation regarding the property is pending in New York (litigation commenced by Oak Point). The law supports venue of Britestarr's case in New York. The only possible legal issues basis for transferring the case would be if Mr. Norton is an affiliate of Britestarr, an issue that has been hotly contested by Oak Point. If Oak Point is correct in its argument that they own the shares of Britestarr, then Britestarr is not an affiliate of the Debtor and the case should not be transferred because there is no legal basis for the transfer.

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Moreover, Oak Point erroneously attempts to mischaracterize Britestarr's filing as an effort to undermine this Court. Britestarr's filing will not interfere or risk any judicial inconsistency or inefficiency in the administration of Mr. Norkin's cases. Britestarr's filing in the Southern District of New York serves to preserve the value of its assets, provide the most convenient and efficient forum for the sale of Britestarr's primary asset, property located in New York, and was done in the interest of justice and the best interests of Britestarr's creditors. In addition, the litigation pending in Mr. Norkin's case is different from the litigation pending in Britestarr's case.[1] If Oak Point truly believed all litigation involving Britestarr should be in Connecticut, they would have never filed their case in New York Supreme Court, or they would have removed those cases to this Court. They did not.

Finally, safeguards will be in place to protect Norkin's estate's interest in the Britestarr assets. Mr. Norkin will not be in control of the affairs of Britestarr. If this Court ultimately determines that Mr. Norkin is the rightful owner of the Britestarr shares, and the property is sold, the funds will be distributed to Mr. Norkin's trustee in accordance with the property scheme set forth in the Bankruptcy Code.

In sum, there is no legal or factual basis for transferring venue of Britestarr's case, and such a transfer may be detrimental to a sale of the property. Thus, Britestarr's choice of forum should not be overridden by this Court.

BACKGROUND

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[1] In fact, on even date herewith, a complaint involving breach of contract claims against ABB and Oak Point is being filed by Britestarr.

On May 20, 2002 (the "Petition Date"), Britestarr filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York, Case No. 02-12411 (CB). Britestarr's bankruptcy case has been inactive since the Petition Date.

Britestarr was formed in 1986 to purchase property in New York City, construct a factory for affordable modular housing, and sell the housing to developers in the New York metropolitan area. In September 1988, Britestarr purchased from Consolidated Rail Corporation approximately twenty-eight (28) acres of real property located at 400 Oak Point Avenue in the Bronx (the "Property"). The Property was purchased for $3,167,100. The purchase of the Property was financed by a loan from Lloyds Bank PLC ("Lloyds") in the amount of $4,450,000 (the "Loan") made on or about September 7, 1988. The Loan was secured by a mortgage on the Property (the "Mortgage") and a personal guaranty from Friema Norkin (the "Guaranty"), the former wife of David Norkin. As partial security for the Loan and Guaranty, Friema Norkin pledged the shares of the stock in Britestarr by a pledge agreement dated September 7, 1988, which shares were transferred to David Norkin pursuant to a document executed by Friema Norkin on January 10, 1989.[2]

Unable to secure financing for the modular home factory, Britestarr began recycling and processing construction and demolition debris on the Property. In 1988, Britestarr formed Oak Point Associates to run the recycling and processing operations on the Property. At the same

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[2] Britestarr is mindful of the fact that a controversy exists regarding the validity of this document. As discussed throughout this Objection, Britestarr does not intend to seek rulings from the Southern District of New York regarding issues that are before this Court, rather Britestarr intends to proceed with the orderly liquidation of its

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time, Britestarr was preparing the Property for sale. The Property was used for recycling and processing construction and demolition debris from January 1989 through October 1989. Oak Point Associates has since been dissolved.

Upon information and belief, a satisfaction of mortgage dated July 16, 1993 was filed by Lloyds discharging the Mortgage. In December 1998, Britestarr executed an option agreement with ABB Energy Ventures, Inc., predecessor-in-interest to ABB Equity Ventures, Inc. (collectively, Oak Point and its affiliate, ABB Energy Ventures, Inc., are referred to hereinafter collectively as "ABB"), whereby ABB had the option to purchase the Property for not less than $31,400,000 nor more than $35,000,000. ABB did not exercise the option, which was due to expire on December 31, 2001. This option is now the subject of litigation in New York County and its expiration is pending on the outcome of that litigation (the "Ownership Litigation"). In lieu of a lump sum purchase price, Britestarr could alternatively retain an ownership interest in the entity that ABB was forming to construct a power plant on the Property. That ownership interest would entitle Britestarr to receive annual equity distributions for a thirty (30)-year period.

Several potential purchasers have previously expressed interest in purchasing the Property, however, none have concluded a deal because, upon information and belief, the Ownership Litigation with ABB and the effect it would have on a potential sale..

There is a judgment against the Property, in the principal amount of $1,378,135 held by Craig W. Galea and Mark C. Kruse ("Galea and Kruse"). Under a forbearance agreement dated

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primary asset in the most appropriate, efficient and convenient forum and the distribution to its creditors under the

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February 21, 2001, Galea and Kruse agreed to forbear from enforcing their rights as judgment creditors for a period of 548 days from the date of the agreement.

In light of the Ownership Litigation, the outstanding judgment held by Galea and Kruse, and the potential tax and other liabilities, Britestarr filed for bankruptcy because it believed a sale of substantially all of its assets in bankruptcy would ensure the best outcome for all creditors in the case and preserve the value of Britestarr's assets pending the outcome of the Ownership Litigation and other matters.

On May 29, 2002, Oak Point filed the Motion. For the reasons set forth below, the Motion should be denied..

RELIEF REQUESTED

Britestarr is seeking to have the Court deny the Motion to transfer the venue of its bankruptcy case from the Southern District of New York to the District of Connecticut.

APPLICABLE STANDARDS

Section 1408 of title 28 of the United States Code provides, in pertinent part:

> Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court in the district—
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> (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement . . . or principal place of business in the United States, or principal assets in the United States, of such person were located in any other district; or

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applicable sections of the Bankruptcy Code.

28 U.S.C. §1408.

Section 1412 of title 28 of the United States Code provides, in pertinent part:

> A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.

28 U.S.C. § 1412.

Rule 1014(b) of the Federal Rules of Bankruptcy Procedure provides, in pertinent part:

> (b) If petitions commencing cases under the Code are filed in different districts by or against . . . (4) a debtor and an affiliate, on motion filed in the district in which the petition filed first is pending and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the court may determine, in the interest of justice or for the convenience of the parties, the district or districts in which the case or cases should proceed.

Fed. R. Bankr. P. 1014.

Section 101(2)(A) and (B) of the Bankruptcy Code provides, in pertinent part:

> (2) "affiliate" means—
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> (A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor . . . .
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> *** *** *** ***
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> (B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor . . . .

11 U.S.C. § 101(2)(A) and (B).

ARGUMENT

Britestarr's bankruptcy case was filed in a proper venue to protect the value of Britestarr's assets and should not be transferred to Connecticut simply because Mr. Norkin, a debtor before this Court, asserts an ownership interest in Britestarr. The interest of justice and the convenience of the parties dictate that Britestarr's bankruptcy proceeding remain in the Southern District of New York. Throughout the Motion, ABB grossly mischaracterizes the reasons for the Britestarr filing and incorrectly asserts that the filing will inhibit the just administration of either the Britestarr case or the case before this Court.

The Britestarr filing is intended to serve as a vehicle for the sale of the Property, the proceeds of which will be distributed to creditors in accordance with the priority accorded them under the Bankruptcy Code. Despite attempts by ABB to imply otherwise, the separate administration of the distinct estates at issue can result in no conflict between the two venues. This Court will decide who is entitled to the equity interest, but the Southern District of New York will decide how to distribute the funds to the Britestarr creditors. Thus, each Court serves the interests of the parties, justly administers the issues before it, and maximizes recovery to creditors.

In the Ownership Litigation, ABB has asserted that it owns the stock in Britestarr, and it has vehemently opposed Mr. Norkin's position that he owns the stock in Britestarr. As such, ABB should be estopped from making the disingenuous argument that the affiliate embodied in Bankruptcy Rule 1014(b), requires the transfer of Britestarr's case to the District of Connecticut. ABB's Motion is nothing more than a transparent attempt to wrestle for control over the Property. The Court should deny the Motion.

The Southern District Of New York Is A Proper Venue For Britestarr's Bankruptcy Proceeding

Section 1408(1) permits a prospective debtor to select the venue for its Chapter 11 bankruptcy proceedings. See In re Enron Corp., 274 B.R. 327, 341 (Bankr. S.D.N.Y. 2002). Section 1408(1) provides four alternative bases for establishing proper venue—any jurisdiction where the debtor maintains (1) a domicile, (2) a residence, (3) a principal place of business, or (4) its principal assets.

Britestarr is a New York corporation, which maintains its executive offices and principal place of business in the Southern District of New York. Britestarr's sole asset is the approximately 28 acres of real property located at 400 Oak Point Avenue in the Bronx (the "Property"), which was purchased in September, 1988. Thus, venue is proper in the Southern District of New York pursuant to section 1408(1) of title 28 of the United States Code.

The Interest Of Justice And The Convenience Of The Parties Will Best Be Served By Maintaining Britestarr's Bankruptcy Case In The Southern District Of New York

The Court must also consider the interest of justice and the convenience of the parties in determining whether to transfer the venue of the Britestarr case. See Fed. R. Bankr. P. 1014(b)(4). The burden is on ABB, as the movant, to show by a preponderance of the evidence that the transfer of venue from the Southern District of New York to the District of Connecticut is warranted. See In re Raytech Corp., 222 B.R. 19, 25-26 (Bankr. D. Conn. 1998); Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.), 896 F.2d 1384, 1390 (2d Cir. 1990). Here, the interest of justice and the convenience of the parties weigh decisively in favor of maintaining the venue of Britestarr's case in the Southern District of New York.

In considering the convenience of the parties, courts weigh several factors, including:

(a) the proximity of creditors of every kind to the court;

(b) the proximity of the debtor to the court;

(c) the proximity of the witnesses necessary to the administration of the estate;

(d) the location of the assets;

(e) the economics of administering the estate; and

(f) the necessity for ancillary administration if liquidation should result.

See In re Enron Corp., 275 B.R. at 343; In re Raytech Corp., 222 B.R. at 26; In re Gurley, 215 B.R. 703, 709 (Bankr. W.D. Tenn. 1997); In re Ridgely Communications, Inc., 107 B.R. 72, 78 (Bankr. D. Md. 1989).

In addition, when considering the interest of justice, courts apply a broad and flexible standard, which includes "whether transfer of venue would promote timeliness, fairness, the efficient administration of the bankruptcy estate, and judicial economy." In re Raytech Corp., 222 B.R. at 25 (citing Manville, 896 F.2d at 1391). See also Enron, 274 B.R. at 343. Given that the economic and efficient administration of the estate is a common consideration under both the "interest of justice" and "convenience of the parties" tests, courts consider this factor to be one of the most important. Enron, 274 B.R. at 343; Gurley, 215 B.R. at 709; In re Metz, 173 B.R. 280, 282 (Bankr. E.D.N.Y. 1994); and Ridgely, 107 B.R. at 78.

Britestarr's bankruptcy case will involve a sale of the Property. The economics of administering the Property could be adversely impacted if venue is transferred to Connecticut. Given that the Property is situated in New York, the Property can be marketed and sold in a more efficient manner if Britestarr's case remains in the Southern District of New York. There would be additional costs and expenses incurred in connection with a sale of the Property if a Connecticut trustee must administer Britestarr's estate. The proposed counsel for Britestarr's potential chapter 11 trustee, who are New York attorneys, are familiar with the operations of Britestarr and the Property, and will be able to better assist in the sale of the Property. Thus, the efficient and economic administration of Britestarr's estate will be best promoted by maintaining Britestarr's case in the Southern District of New York.

In addition, the majority of Britestarr's creditors are located in New York. Britestarr is a New York corporation that maintains its place of business in the Southern District of New York. Britestarr's sole asset (the Property) is located in the Southern District of New York. Britestarr's connections with New York are numerous, long standing and substantial. See In re Raytech Corp., 222 B.R. at 26. Thus, the convenience of the parties dictates that Britestarr's bankruptcy case remain in the Southern District of New York.

The Southern District of New York is a convenient forum for the vast majority of the creditors or parties-in-interest in Britestarr's bankruptcy case. "'Where a transfer would merely shift the inconvenience from one party to the other, or where after balancing all the factors, the equities leaned but slightly in favor of the movant, the [debtor's] choice of forum should not be disturbed.'" In re Enron Corp., 274 B.R. at 342-43 (quoting In re Garden Manor Assoc., L.P., 99 B.R. 551, 553 (Bankr. S.D.N.Y. 1988)).

Furthermore, Britestarr filed its bankruptcy petition to, among other things, stay a foreclosure action instituted by a governmental agency of the State of New York. The foreclosure action and the claim of the State of New York constitute a local controversy. The State of New York has an interest in having this local controversy decided in a New York forum. Cf. Metz, 173 B.R. 280 (transferring a case from Connecticut to New York because, among other reasons, many of the unsecured priority claims are New York municipal taxing authorities); and In re Portjeff Development Corp., 118 B.R. 184, 193 (Bankr. E.D.N.Y. 1990) ("Also relied on [in deciding whether to transfer venue] is a state's interest in having local controversies decided within its borders.").

The interest of the State of New York in attending to the disposition of real property located therein is substantial and should not be dismissed lightly. In fact, ABB, in another sign of the disingenuous and self-serving nature of its Motion, chose New York as the forum for the Ownership Litigation. This fact serves as further evidence of the appropriateness of the Southern District of New York to dispose of the Property. In addition, the existence of other legal proceedings in New York further reveals the substantial interest of the State of New York with respect to the disposition of the Property.

ABB MISCHARACTERIZES THE EFFECT OF THE BRITESTARR FILING AND IGNORES THE EFFORTS MADE BY BRITESTARR TO AVOID ANY RISK OF IMPROPRIETY OR DAMAGE TO THIS CASE

ABB incorrectly argues that Mr. Norkin is attempting to evade this Court's jurisdiction and that Britestarr is improperly forum shopping. Mr. Norkin is not attempting to evade this Court's jurisdiction. He simply acted to preserve the estate of Britestarr and the value of the equity interest in Britestarr. A debtor is permitted to select the forum for its bankruptcy proceeding, and there is nothing improper about selecting the venue where all of a debtor's assets are located.

Furthermore, conversations between the undersigned and ABB's counsel after the Britestarr filing included explanation and representations that the Britestarr filing was not designed to evade jurisdiction in Connecticut and that Britestarr planned to fully cooperate with the Connecticut Bankruptcy Court and, in fact, facilitate any determination by the Bankruptcy Court regarding the appropriate disposition of the proceeds of the sale of the Property to Britestarr's equityholders. Despite these representations to ABB's counsel, ABB insists on painting Britestarr's filing as involving some illegitimate purpose. In fact, its designed to facilitate a sale of the Property and distribute the funds as the relevant Bankruptcy Court deem appropriate.

There was no nefarious purpose behind Britestarr's bankruptcy filing. To the contrary, Britestarr's bankruptcy case was filed to preserve the value of Britestarr's estate. The value of Britestarr's assets was in jeopardy because the State of New York had instituted a foreclosure proceeding, which threatened to extinguish any equity in the Property. In addition, Britestarr considered the Ownership Litigation, the outstanding judgement held by Galea and Kruse and the potential tax and other liabilities, as reasons to file for bankruptcy protection. A bankruptcy court-approved sale of Britestarr's assets will ensure the best outcome for all creditors, most of whom are located in New York. In addition, ABB omits the fact that Britestarr is seeking the appointment of a chapter 11 trustee so that its estate may be administered despite the pendency of the Ownership Litigation without fear of the illegitimate purposes asserted throughout the Motion. The dispute between ABB and Mr. Norkin should not prejudice Britestarr's creditors.

In the Motion, ABB incorrectly argues that Mr. Norkin caused Britestarr to file for bankruptcy protection in New York to evade this Court's jurisdiction and to improperly forum shop. Mr. Norkin simply acted to preserve the estate of Britestarr. The Southern District of New York is a proper forum for Britestarr's bankruptcy case. There is no reason for Britestarr's bankruptcy case to be in Connecticut, except for the fact that Mr. Norkin asserts that he owns the stock in Britestarr. Britestarr has no other connection to Connecticut.

ABB also incorrectly argues that Britestarr's bankruptcy filing has insulated Britestarr from Mr. Norkin's estate. ABB makes much of the allegation that the stock in Britestarr may be the most valuable asset of Mr. Norkin's estate. However, the ownership of Britestarr is in dispute. If ABB owns the stock in Britestarr, then the stock in Britestarr is not part of Mr. Norkin's estate. To the extent that Mr. Norkin owns Britestarr, the value of the stock remains in his estate.

ABB also incorrectly argues that creditors of Britestarr and Mr. Norkin will be competing for the value generated by the Property. Again, because of the Ownership Litigation, there is an open question as to whether Mr. Norkin's creditors will receive anything on account of his asserted equity interest in Britestarr. In any event, the proceeds from the sale of the Property will be distributed in accordance with the priorities set forth in the Bankruptcy Code. Any value from the Property will be distributed last to the equity interest in Britestarr, whether ABB or Norkin. Thus, there will be no competition between creditors of the respective estates.[3]

ABB argues that Britestarr is allegedly an affiliate of Mr. Norkin, and that Britestarr's case should be transferred to the District of Connecticut, where Mr. Norkin's bankruptcy case is pending. ABB should be estopped from pursuing this argument, because ABB asserts that it owns the stock in Britestarr in the Ownership Litigation. At the very least, the Court should see the transparency of ABB's disingenuous argument.

ABB is ardently asserting that it, as opposed to Mr. Norkin, owns the stock in Britestarr. While parties are permitted to present arguments in the alternative, the Court should consider

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[3] The Court should be aware that Britestarr filed a complaint against ABB and Oak Point on even date herewith asserting the breach of various contract claims which are distinct from the issues presented to this Court.

ABB's motivation in attempting to have Britestarr's case transferred to the District of Connecticut. ABB is wrestling for control of the Property, which now will be disposed of only upon approval by a bankruptcy court.

Because the ownership of Britestarr is in dispute, it is not clear whether Britestarr is an affiliate of Mr. Norkin. Under these circumstances, and given the fact that the Southern District of New York is a proper venue for Britestarr's bankruptcy case, the Court should not employ the affiliate rule as the basis for transferring the venue of Britestarr's case to the District of Connecticut. Transferring venue of a bankruptcy proceeding should not be taken lightly, and a debtor's choice of forum is entitled to great weight if venue is proper. See In re Enron Corp. et al., 274 B.R. at 342 (citing Commonwealth of Puerto Rico v. Commonwealth Oil Refining Co. (In re Commonwealth Oil Refining Co.), 596 F.2d 1239, 1241 (5th Cir. 1979); In re Ocean Properties of Delaware, Inc., 95 B.R. 304, 305 (Bankr. D. Del. 1988); and In re Windtech, 73 B.R. 448 (Bankr. D. Conn. 1987)). The Court should exercise its discretion and defer to Britestarr's choice of forum by permitting Britestarr's case to remain in the Southern District of New York.

CONCLUSION

The interest of justice and the convenience of the parties weigh decisively in favor of maintaining venue of Britestarr's bankruptcy case in the Southern District of New York. ABB cannot satisfy its burden of showing by a preponderance of the evidence that a transfer of venue is warranted. The Court should not transfer Britestarr's case to the District of Connecticut.

WHEREFORE, Britestarr respectfully requests that this Court deny the Motion to transfer the venue of Britestarr's bankruptcy case from the Southern District of New York to the District of Connecticut and such other relief as this Court deems just and proper.

Dated: June 13, 2002
New York, New York

Respectfully submitted,

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